In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-258

BETH KOEHLER DIEHL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. 1-A to 30-A; 31-A to 40-A) are not yet reported. The opinion of the court of appeals (Pet. App. 1-B to 21-B) is reported at 438 F.2d 705.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22-B to 23-B) was entered on February 18, 1971, and a petition for rehearing was denied on March 16, 1971 (Pet. App. 24-B). The petition for a writ of certiorari was filed on June 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

438-102—71

QUESTION PRESENTED

Whether either petitioner Diehl or petitioner Ritter could be substituted for the decedent as plaintiff in a suit the decedent had instituted for refund of federal income taxes.

STATUTES AND RULE INVOLVED

The pertinent provisions of the Texas Probate Code, Vernon's Tex. Civil Stat. Ann., are as follows:

> Section 6. Venue for Probate of Wills and Administration of Estates of Decedents
>
> Wills shall be admitted to probate, and letters testamentary or of administration shall be granted:
>
> (a) In the county where the deceased resided, if he had a domicile or fixed place of residence in this State.
>
> (b) If the deceased had no domicile or fixed place of residence in this State but died in this State, then either in the county where his principal property was at the time of his death, or in the county where he died.
>
> (c) If he had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in any county in this State where his nearest of kin reside.
>
> (d) But if he had no kindred in this State, then in the county where his principal estate was situated at the time of his death.
>
> (e) In the county where the applicant resides, when administration is for the purpose only of receiving funds or money due to a deceased person or his estate from any governmental source or agency; provided, that unless the mother or father or spouse or adult child

of the deceased is applicant, citation shall be served personally on the living parents and spouses and adult children, if any, of the deceased person, or upon those who are alive and whose addresses are known to the applicant. * * *

Section 69. Voidness Arising From Divorce

If the testator is divorced after making a will, all provisions in the will in favor of the testator's spouse so divorced, or appointing such spouse to any fiduciary capacity under the will or with respect to the estate or person of the testator's children, shall be null and void and of no effect. * * *.

Rule 25 of the Federal Rules of Civil Procedure provides in pertinent part:

Substitution of Parties

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

* * * * *

STATEMENT

Kent B. Diehl, Sr., instituted this action in 1962 for the refund of federal income taxes in the amount of $5,548.21. After his death in 1966, the district court allowed petitioner Beth Koehler Diehl to intervene as plaintiff on the ground that she and the decedent had filed a joint return for the year in question and that the taxes sought to be refunded represented community property (Pet. App. 2–B to 4–B). Several months later, the district court granted petitioner Diehl's motion to be substituted for the decedent, as the appointed executrix of his estate,[1] pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure. However, upon the government's motion to vacate the substitution on the ground that the order of the probate court appointing her executrix had been based upon material misrepresentations of fact (Pet. App. 4–B to 5–B),[2] the district court vacated the substitution order.

Thereafter, the district court granted a motion to substitute petitioner Ritter as plaintiff in the refund suit on the ground that he was temporary adminis-

---

[1] Petitioner Diehl was appointed executrix by a Texas probate court on the basis of her allegations that the decedent had died domiciled in Texas, never having been divorced, that she was his widow, and that the decedent's last will named her as executrix (Pet. App. 5–B to 7–B).

[2] The government's motion presented the following newly discovered facts: The decedent and petitioner Diehl had obtained a Mexican divorce on October 28, 1959; the decedent had remarried, executed a new will naming his second wife as executrix, had left Texas seven years prior to his death, and had established a permanent home in California (Pet. App. 5–B to 7–B).

trator of the decedent's estate (Pet. App. 12–B to 13–B).[3] But this substitution was also vacated, on the court's own motion, on the ground that since the decedent had died domiciled in California leaving no assets in Texas, the Texas probate court had no jurisdiction to appoint an administrator to pursue the refund litigation. The district court thereupon dismissed the refund action[4] and the court of appeals affirmed (Pet. App. 1–B to 21–B).

ARGUMENT

The decision below is correct, and there is no conflict of decisions or other reason for further review.

1. The district court properly refused to substitute petitioner Diehl for the decedent in the refund suit pending at his death. The "proper party" to be substituted under Rule 25(a)(1) of the Federal Rules of Civil Procedure is the legal representative of the decedent, *Mallonee* v. *Fahey*, 200 F. 2d 918 (C.A. 9). The decedent's marriage to petitioner Diehl, however, was terminated by divorce in 1959.[5] Petitioner Diehl's

[3] Ritter's appointment as temporary administrator by the probate court was based on his allegation that the estate consisted solely of Diehl's claim for refund and that the administration was sought under Section 6(e) of the Texas Probate Code for the sole purpose of receiving funds or money due to the decedent from the United States (Pet. App. 16–B).

[4] Petitioner Diehl was allowed 30 days to reinstate the suit in her own right if in fact she had filed a claim for refund (Pet. App. 19–B to 20–B).

[5] Although the divorce was procured in Mexico, both parties were present and represented by counsel. Petitioner Diehl was thus estopped from challenging the validity of that divorce for the sole purpose of claiming "widow" status and assuming a fiduciary role in her former husband's estate. *Perrin* v. *Perrin*, 408 F. 2d 107 (C.A. 3); *Dunn* v. *Tiernan*, 284 S.W. 2d 754 (Tex. Civ. App.).

appointment as executrix by the Texas probate court was based on material misrepresentations and was properly disregarded by the district court.

2. Moreover, the decedent died a domicilary of California, where he had resided with his second wife for five years prior to his death, and left no assets in Texas which could be the basis for founding an administration in that state. The estate's only asset was his claim for refund—a debt due from the United States, whose situs was in California, the creditor's domicile. *Wyman* v. *Halstead,* 109 U.S. 654 (1884). The Texas probate court thus had no jurisdiction over the decedent's estate. See *Cooper* v. *Gulf C. & S.F. Ry. Co.,* 93 S.W. 201 (Tex. Civ. App.). Its orders appointing petitioner Diehl as executrix and petitioner Ritter as temporary administrator were void and not entitled to full faith and credit in the district court. *Burbank* v. *Ernst,* 232 U.S. 162; *Tilt* v. *Kelsey,* 207 U.S. 43.[6]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
JOHNNIE M. WALTERS,
Assistant Attorney General,
ANN E. BELANGER,
Attorney.

JULY 1971.

[6] Of course, the decision below does not affect any rights the decedent's second wife might have to pursue the refund litigation.

U.S. GOVERNMENT PRINTING OFFICE: 1971